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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. ~~859~~ 115

WILLIAM HENRY NAGEL,

Petitioner,

vs.

THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT OF PETITION

GEORGE H. LAYMAN,
CARL W. BERUFFY,
HYMAN SMOLLAR,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 859

WILLIAM HENRY NAGEL,

Petitioner,

vs.

THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable the Justices of the Supreme Court of the United States:

The petitioner, William Henry Nagel, respectfully petitions for a writ of certiorari to review a decision of the Supreme Court of the State of Oregon, rendered February 8, 1949 (R. 109), rehearing denied March 15, 1949 (R. 109).

Opinion of Court Below

The opinion of the Supreme Court of Oregon, rendered February 8, 1949, is not yet reported in the permanent reports. It has been published in the Oregon Advance Sheets, Volume 48, Page 101. The opinion in full is set

forth in the record at pages 85 to 108. Rehearing was denied March 15, 1949 (R. 109), without further opinion.

Questions Presented

1. Is a trial in which the judge, although disqualifying himself to act because of his personal interest as the complaining witness and private prosecutor, after the return of the indictment but prior to the trial, examines the panel from which the petty jury is to be selected and excuses nineteen of the forty-two prospective jurors, a fair trial such as is guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States?

2. Is a trial before a jury, a majority of whom have served as jurors before the disqualified judge in the same term, the fair and impartial trial guaranteed by the Fourteenth Amendment to the Constitution of the United States when the judge lays aside his role as the judicial arbiter to appear as the complaining witness and private prosecutor?

3. Was the act of the disqualified judge in personally excusing, for reasons not known to the defendant, nineteen of the forty-two members of the panel from which the petty jury was thereafter selected, such a denial of due process and equal protection of the law as to oust the Circuit Court of Klamath County, Oregon, of jurisdiction in the case of the petitioner?

Summary Statement of the Matter Involved

William Henry Nagel was charged with the felony of contributing to the delinquency of a minor child, Cecile Vandenberg (R. 1), the daughter of Honorable David R. Vandenberg, Circuit Judge for Klamath County, Oregon (R. 6). Nagel was compelled, over his repeated objections, to stand

trial in Klamath County before a petty jury selected from a panel which was composed of forty-two jurors, but from which, after the return of the indictment and the disqualification of Judge Vandenberg, and before the trial of the cause, Judge Vandenberg had excused, for reasons not known to us or appearing of record, nineteen jurors. From the remaining jurors whom Judge Vandenberg had screened, a petty jury of twelve persons was selected.

Judge Vandenberg was the real adversary of the petitioner in the trial in Klamath County, although the State of Oregon was technically the adverse party. Judge Vandenberg swore to the original information of felony (R. 11, 12), the document upon the basis of which the case was presented to the Grand Jury. Under the statutes of Oregon, this made him the private prosecutor and under certain circumstances responsible for costs. Oregon Compiled Laws Annotated, Section 26-1218. He appeared as a witness before the Grand Jury (R. 1) and the indictment returned on May 20, 1947, was at least partially founded on his testimony before the Grand Jury. When the indictment was returned, Judge Vandenberg received it (R. 92) and set the bail of the petitioner (R. 2). After all of these proceedings had occurred, Judge Vandenberg examined the panel of jurors, and as has been said, excused nineteen out of the panel of forty-two (R. 15, 16, 18, 33, 35). Prior to the trial, Judge Vandenberg disqualified himself as trial judge (R. 2). However, other trials, in which Judge Vandenberg presided, were conducted before this same panel of jurymen (R. 35). Of the jurors remaining on the panel from which the petty jury was selected, sixteen of the twenty-one (R. 34) had served as jurors under Judge Vandenberg in the same term of court in which Nagel was tried, and seven of the twelve jurors who actually composed the petty jury in Nagel's case had served under Judge Vandenberg in that term of court (R. 76). As a result, in the trial of Nagel's case, Judge

Vandenberg appeared as an important witness for the prosecution before a jury, the majority of whom were accustomed to accepting him as the embodiment of judicial fairness and the personification of legal wisdom in cases which they were called upon to decide.

The petitioner repeatedly asserted that such a trial deprived him of due process of law and of equal protection of the laws, rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The petitioner's rights under the Constitution of the United States were claimed in the only manner provided by the practice of the State Courts of Oregon in the trial court (R. 5, 31, 37, 42, 43, 47, 78), and were reasserted in his assignments of error and argued in the Supreme Court of Oregon (R. 79).

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 1257 of Title 28, United States Code. The Supreme Court of Oregon is the highest court of that State in which a decision in this case could be had. Its decision denied to the petitioner his right to due process of law and equal protection of the laws, rights claimed by petitioner under Amendment Fourteen to the Constitution of the United States, in that petitioner was denied the right to a trial before a jury fairly and impartially selected from the community, and in that petitioner was denied a fair and impartial trial by being required to defend himself in a courtroom usually presided over by his adversary and before a jury, the majority of the members of which had served as jurymen under the adversary-judge at that same term of court.

The assertion of these constitutional rights appears in the record in petitioner's motion for change of venue (R. 4, 5), renewed and supplemental motions for change of venue, and alternative motion for dismissal (R. 25, 28, 29, 31, 37),

re-renewed motion for change of venue (R. 47, 77), motion for directed verdict (R. 82), and motion for new trial (R. 41, 42, 43), all of which were overruled in the trial court (R. 25, 41, 47. 78). A verdict of guilty was returned on September 22, 1947 (R. 39), upon which sentence was entered October 6, 1947 (R. 40). Notice of Appeal was filed December 1, 1947 (R. 45). The Supreme Court of Oregon denied petitioner's contentions in its original decision on February 8, 1949 (R. 85-108), and in its order denying petition for rehearing on March 15, 1949 (R. 109).

The same objections were raised in the petitioner's assignments of error, Nos. 1 to 6, in the Supreme Court of Oregon (R. 79-84). The Supreme Court of Oregon, in its opinion (R. 86), recognized that the petitioner had seasonably raised constitutional issues in the following language:

> "It is contended that the defendant had a statutory right to a change of venue, and that, under the circumstances of this case, it was an invasion of defendant's constitutional rights to deny these motions and compel him to stand trial in Klamath County. Specifically, that he has been deprived of his liberty without due process of law and of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States . . ."

and overruled them (R. 102).

Reasons Relied On for Allowance of Writ

1. Due process of law, required by the Fourteenth Amendment to the Constitution of the United States, necessarily contemplates that trial by jury be before an impartial jury drawn from a cross-section of the community. *Ballard* v. *United States,* 329 U. S. 182, 187; *Thiel* v. *Southern Pacific Co.* 328 U. S. 217; *Glasser* v. *United States,* 315 U. S. 84, 85, 86; *Brown* v. *New Jersey,* 175 U. S. 172, 176; *Hayes* v. *Missouri,* 129 U. S. 68, 71. In this case, such an impartial jury

was not provided by the State of Oregon because the jury was not impartially selected from a representative cross-section of the community. On the contrary, it was selected from a panel which had previously been examined by petitioner's adversary in this case, and from which the adversary, in his capacity as judge of the Court, had excused nineteen of the venire of forty-two. The State of Oregon, in requiring petitioner to defend himself before a jury so selected by his adversary, denied him the fair and impartial jury required by due process and equal protection of the law.

2. Not only was the jury panel unfairly and illegally drawn, but the trial in the Circuit Court of Klamath County was itself a denial of due process and equal protection of law, since it was conducted before a jury accustomed to serving under the direction of Honorable David R. Vandenberg as judge, and which could not be expected to distinguish Judge Vandenberg in his capacity as private prosecutor from his capacity as presiding judge. Nagel was therefore deprived of the protection of basic and immutable principles of justice, one of the most fundamental of which is that every party has a right to stand, as nearly as may be, on an equal footing with his adversary. In denying a change of venue, the State of Oregon denied petitioner this right of due process.

3. The court contemplated by the American tradition of justice is composed not only of a judge and counsel, but also, in matters in which a trial by jury is required, of a fair and impartial jury. Where a court has not constituted itself in accordance with the requirements of the Constitution, it loses its jurisdiction to proceed. *Johnson* v. *Zerbst*, 304 U. S. 458, 468. Because it failed to require such a fair and impartial jury, the Oregon Court was not constituted in

accordance with constitutional requirements, and its jurisdiction was lost. Its judgment is therefore a nullity.

In refusing petitioner's assignments of error, Nos. 1 to 6, inclusive, the Supreme Court of Oregon decided each of the foregoing substantial questions of right under the Constitution of the United States, in a manner not in accord with the standards of due process of law, which have been established by the applicable decisions of this court.

Prayer for Writ

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of the State of Oregon, so that the proceedings in said court in Case No. 15346, The State of Oregon, plaintiff-respondent, *vs.* William Henry Nagel, defendant-appellant, may be reviewed and determined by this court as provided for by the statutes of the United States; that the judgment herein of the said Supreme Court of Oregon be reversed by this court; and that petitioner have such further relief as to this court may seem proper.

Dated JUNE 13, 1949.

GEORGE H. LAYMAN,
CARL W. BERUEFFY,
HYMAN SMOLLAR,
ERNEST J. BURROWS,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 859

WILLIAM HENRY NAGEL,

Petitioner,

v.

THE STATE OF OREGON

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion of the Supreme Court of Oregon, rendered February 8, 1949, has been published in the Oregon Advance Sheets, Volume 48, Page 101. The opinion in full is set forth in the record at pages 85 to 108. Rehearing was denied March 15, 1949 (R. 109), without further opinion.

Jurisdiction

A statement of the jurisdiction of this Court is set forth in the foregoing petition for writ of certiorari.

Statement of the Case

The foregoing petition for writ of certiorari contains, under the title "Summary Statement of the Matter In-

volved", a concise statement of the case, which, in the interest of brevity, will not be repeated here.

Specification of Errors

1. The Oregon Supreme Court erred in holding that in the circumstances of this case the proposed change of venue was a matter of discretion, and not a right, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Oregon Supreme Court erred in holding that in the circumstances of this case the denial of the motions for change of venue was not an abuse of discretion.

3. The Oregon Supreme Court erred in holding that the Circuit Court of Klamath County was not deprived of jurisdiction to try petitioner after the disqualified judge exercised acts of judicial discretion in excusing members of the jury panel.

Summary of Argument

The trial to which Nagel was subjected in the Circuit Court of Klamath County was not such a fair and impartial trial as is guaranteed to every person in the United States by the Fourteenth Amendment to the Constitution of the United States. The necessity of going to trial before a panel selected by the defendant's adversary in every real sense is inherently in conflict with the fundamental ideas of fair trial encompassed within the due process clause.

Not only was the jury panel unfairly and illegally selected, but the entire atmosphere of the trial in which a jury of laymen was expected to draw the fine distinction between the role of Honorable David R. Vandenberg as judge and as private prosecutor, was at variance with our ideas of due process which means basic and immutable principles of justice, the most fundamental of which is the right to stand on an equal footing with one's adversaries in the courts.

The acts of Judge Vandenberg in selecting the jury and the unfair trial to which the petitioner was subjected, were denials of due process of law and of equal protection of the laws and rendered the trial a nullity, thereby ousting the court of jurisdiction.

Argument

1. *A trial in which the presiding judge, although disqualified to act, because of his personal interest, as the complaining witness and private prosecutor, after the return of the indictment but prior to the trial, examines the panel from which the petty jury is to be selected and excuses nineteen of the forty-two prospective jurors, is not a fair trial such as is guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States.*

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Thiel* v. *Southern P. Co.*, 328 U. S. 217, 220; *Ballard* v. *United States*, 329 U. S. 187, 192.

Due process of law, as contemplated by the Fourteenth Amendment, requires that the defendant be tried before an impartial jury, impartially selected from the body of citizens. *Brown* v. *New Jersey*, 175 U. S. 172, 176; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642. This rule means that neither the state nor the defendant has a right to any particular juror, but that each has a right to a jury fairly selected and representative of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group should be sturdily resisted. *Glasser* v. *United States*, 315 U. S. 84, 85.

Nagel was not tried before such a representative jury. The panel of forty-two, drawn from the body of the community, was not subject to criticism on any constitutional grounds. Had the jury been selected from this original panel or from a venire selected at random from the panel, the State of Oregon would have accorded to the petitioner all of the rights with respect to the selection of the jury to which he was entitled under the Fourteenth Amendment. However, it was at this point that Judge Vandenberg interjected himself, and it was at this point that the State of Oregon, by failing to protect Nagel from the personal power of his adversary, invaded Nagel's constitutional right to due process and to equal protection of the laws.

The court below, in a most unrealistic evaluation of the situation before it, held that Judge Vandenberg was not acting specifically in the Nagel case, but was regulating the conduct of the court's business. It further held that Nagel was not entitled to any particular juror but only to a fair and impartial jury.

We do not challenge the rule stated by the court, but we do challenge the application of that rule, since the Oregon Supreme Court apparently felt that Judge Vandenberg could separate his judicial capacity from his private capacity as an outraged father. We submit that the mere statement of such a proposition is its own refutation.

There can be no doubt that Judge Vandenberg was acting as an outraged father of a child against whom an offense had allegedly been committed (R. 105). His examination of the jury could not have been made in the calm and detached impartiality expected from a judge. Even though the prospective jurors were not actually selected with a view of assuring the conviction of Nagel, the ground of suspicion

is so strong as to taint the panel irreparably. As Judge Cooley said, in *Bashford* v. *The People,* 24 Mich. 244:

> "The law aims, as far as possible, to give every man a trial that shall not only be fair but as free as may be from any suspicion of partiality or undue influence."

In *Tumey* v. *Ohio,* 273 U. S. 510, this Court held that a trial before a judge personally interested in the outcome of a trial is a violation of the due process provisions of the Constitution. For the same reasons, a trial before a jury, the composition of which has been weighted against a defendant because it has previously been examined and selected by a judge with a deep personal interest, is an invasion of due process, the denial of which this Court has described as "the failure to observe that fundamental fairness essential to the very concept of justice". *Lisenba* v. *California,* 314 U. S. 219, 236.

2. *A trial before a jury, a majority who have served as jurors before the presiding judge of that court in the same term, is not the fair and impartial trial guaranteed by the Fourteenth Amendment to the Constitution of the United States when the presiding judge lays aside his role as the judicial arbiter to appear as the complaining witness and private prosecutor.*

The trial, as conducted in this case, violates the standards of fairness and impartiality which have long been part of our judicial process. The judge himself could not, in the very nature of things, separate himself in two different entities—one, the regular, although disqualified judge, and the other, as the interested party in the case. If the Judge, trained in the law and judicial standards of fairness, could not be expected to make such a distinction, *a fortiori,* a

jury composed of laymen were completely incapable of such a dichotomy.

Nagel was tried before a jury which had for the entire term of court been accustomed to observing Judge Vandenberg at the judicial bench, ruling fairly and impartially upon issues presented to him by opposing lawyers. Suddenly, they were confronted with Judge Vandenberg on the witness stand, giving testimony against the petitioner in this case. It cannot be supposed that the jury would carefully weigh, from a factual standpoint, the testimony which was given or evaluate it with the precision which juries are expected to exhibit when conflicting evidence is presented to them.

The role of the judge in any court has been described by this Court, in *Quercia* v. *United States*, 289 U. S. 466, 470:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference and may prove controlling'."

This same deference is certain to be accorded to a trial judge in his own courtroom, regardless of whether he sits at the judge's bench or whether he sits in the witness chair. The petitioner was, like all defendants in cases of this kind, faced with a charge which is "easy to be made and hard to disprove, but harder still to defend against, though the defendant be ever so innocent." To require him to go to trial against an adversary so powerful in the locale in which this trial was forced upon the defendant, deprives him of the very essence of an equal footing before a jury of his peers and adds an intolerable burden to his task of making a defense.

It is not and it cannot be due process to require such a trial, and the State of Oregon is obliged by the Constitution of the United States to provide a remedy in such a

situation. The State of Oregon has, in fact, provided such a remedy in its provisions for change of venue. Oregon Compiled Laws Annotated, Section 26-312. But in holding that the change was a matter for the discretion of the trial court, the Supreme Court of Oregon deprived Nagel of the equal protection afforded by that law.

The Oregon court stood on the technical point that in any county, Judge Vandenberg would have a special status. In a sense, this is true, but the court was not realistic in not recognizing that his position in Klamath County was unique, unparalleled in any one of the other counties in Oregon, because in no other county would the jury have been trained by experience to accept him as the embodiment of judicial fairness.

There must be an inherent right to a change of venue in the circumstances of this case if due process of law is to be met.

3. *The decisions of this court have established that where a trial is conducted in such a manner to deprive the defendant of due process and equal protection of the law, the trial is a nullity and the court is without jurisdiction to act.*

In the American tradition, a court is composed not only of the judge but of counsel representing the parties and of a fair and impartial jury. In *Johnson* v. *Zerbst,* 304 U. S. 458, 463, this Court held that the failure to complete the court by providing counsel was a denial of constitutional rights of such a nature as to stand as a jurisdictional bar to a valid conviction, and that a court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to a failure to complete the court by providing counsel. In the case at bar, there was a failure to complete the court by providing a fair and impartial jury and it is

clear that this also was such a denial of constitutional rights as to oust the court of jurisdiction to determine the case because of its failure to complete the court.

Representative of the numerous decisions which have held that the failure to protect and enforce the constitutional rights of a defendant renders the final judgment of the court a nullity are *Uveges* v. *Pennsylvania,* 335 U. S. 467; *Townsend* v. *Burke,* 334 U. S. 736; *Bowen* v. *Johnson,* 306 U. S. 19; *Mooney* v. *Holohan,* 294 U. S. 103, in all of which a prisoner was held entitled to the writ of *habeas corpus* to attack a judgment based on proceedings in which constitutional rights had been denied.

We respectfully submit that there is no question here that the trial of Nagel in the state courts of Oregon deprived him of due process and that this Court should, in the exercise of its vigilant protection of the constitutional rights of citizens, declare the proceedings of the state courts to be a nullity and reverse the judgment. If it would do so upon an application for writ of *habeas corpus,* as we submit that the decisions above cited establish that it would, there should be less hesitancy in taking a remedial action on a direct appeal and certiorari from the proceedings in the trial court.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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APPENDIX A

Section 13-603, Oregon Compiled Laws Annotated, as amended by Chapter 438, Oregon Laws. 1941:

"*Judicial Officer defined:*

Disqualification: Application of Section: Waiver. A judicial officer is a person authorized to act as a judge in a court of justice.

Such officer shall not act as such in a court of which he is a member in any of the following cases:

(1) In an action, suit or proceeding to which he is a party, or in which he is directly interested;

(2) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(3) When he is related to any party, or to the attorney for any party, or to the partner or office associate of any such attorney, by consanguinity or affinity within the third degree;

(4) When he has been attorney in the action, suit or proceeding in question for any party.

But this section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in subdivisions 3 and 4, the disqualification may be waived by the parties, and, except in the supreme court, shall be deemed to be waived, unless an application for a change of the place of trial be made as provided in this code."

APPENDIX B

Section 1-404, Oregon Compiled Laws Annotated:

(Code of Civil Procedure, Title 1, Chapter 4)

"The court or judge thereof, may change the place of trial, on the motion of either party to the action, when it appears from the affidavit of such party, or if he is not a resident of the county, the affidavit of any one on his behalf; either,

(1) That the action has not been commenced in the proper county; or,

(2) That the judge is a party to, or directly interested in the event of the action, or connected by consanguinity or affinity within the third degree, with the adverse party, or those for whom he prosecutes or defends; or,

(3) That the judge or the inhabitants of the county are so prejudiced against the party making the motion, that he cannot expect an impartial trial before said judge, or in said county as the case may be; or,

(4) That the convenience of witnesses and the parties would be promoted by such change; and

(5) That the motion is not made for the purpose of delay."

APPENDIX C

Section 26-312, Oregon Compiled Laws Annotated:

(Penal Code, Title 26, Chapter 3, article 2.)

"*Felonies: Causes for Change: Facts to be shown by Affidavit.*

In an action for a felony, when the case is at issue upon a question of fact, the court may order the place of trial to be changed, as follows:

(1) When it appears by affidavit, to the satisfaction of the court, that a fair and impartial trial cannot be had in the county where the action is commenced;

(2) When the action is commenced in one county, and might have been commenced in another, the place of trial may be changed to such other county, if it appears in like manner that the ends of justice, the convenience of parties and witnesses would be prompted thereby; and

(3) That the motion is not made for delay."

APPENDIX D

Section 26-1217, Oregon Compiled Laws Annotated:

"*Judgment against private prosecutor: Indorsement of name: Entry that prosecution is malicious or without probable cause.*

The name of every person who voluntarily appears before any justice of the peace or grand jury to prosecute any person in a criminal action, either for a misdemeanor or felony, shall be indorsed upon the complaint, information, or indictment as private prosecutor; and if it shall be found by any justice or court trying said action or hearing said proceeding that the prosecution is malicious or without probable cause, said fact shall be entered upon record in said action or proceeding by said justice or court."

Section 26-1218, Oregon Compiled Laws Annotated:

"*Entry of judgment against prosecutor: Enforcement.*

Upon making the entry prescribed in section 26-1217, the justice or court must immediately render judgment against the private prosecutor for the cost and disbursements of the action or proceeding, which may be enforced by execution, in the same manner as a judgment in a civil action."